

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 23 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0295
	)	DEPARTMENT B
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
VICTOR STEVEN VALENZUELA,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200801519

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General  
By Kent E. Cattani, Joseph T. Maziarz, and  
Matthew Binford, a student certified  
pursuant to Rule 38(d), Ariz. R. Sup. Ct.

Phoenix  
Attorneys for Appellee

Harriette P. Levitt

Tucson  
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Victor Valenzuela was convicted of possession of a dangerous drug for sale, possession of drug paraphernalia, and possession of marijuana. The trial court sentenced him to concurrent, presumptive terms of imprisonment, the longest of which was ten years. On appeal, Valenzuela relies on *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983), to argue the trial court committed fundamental, prejudicial error in permitting the state to elicit expert testimony that embraced an ultimate issue of fact properly left for the jury's determination. For the following reasons, we affirm.

¶2 At trial, Pinal County Sheriff's personnel testified that, while Valenzuela was being detained by deputies, he had thrown three plastic bags a few feet away from him. The bags later were determined to contain methamphetamine weighing a total of 5.93 grams. A deputy also recovered a scale, two pipes, and marijuana cigarettes from Valenzuela's vehicle.

¶3 The state additionally called Detective John Campbell, an investigator assigned to the Pinal County Narcotics Task Force, to testify about his observations of common practices in methamphetamine use and sales. He testified he reviews the evidence in each case to determine whether to submit charges alleging simple possession or possession for sale. And, his review in this case suggested the appropriate charge was possession of methamphetamine for sale. Campbell stated that, based on his training and experience, the packaging of the methamphetamine in three separate baggies, each containing an equivalent weight, was strongly indicative of possession for sale. He also opined that, although a buyer might use a scale to verify his purchase, possession of a

scale is most often associated with a drug seller. Valenzuela did not object to the questions posed or answers given during the state's direct examination of Campbell, and appears to have conducted a full cross-examination.

¶4 On appeal, Valenzuela argues Campbell's "conclusory statement that he had determined [Valenzuela] possessed the drugs for sale was unfairly prejudicial, . . . invaded the province of the jury," and constituted fundamental error. His argument that the state attempted to substitute Campbell's "professional determination" for the jury's deliberation is based on the following testimony:

Q. So to be fair[,] in your expert opinion[, Valenzuela's possession of two marijuana cigarettes] would be more of a possession [than a possession for sale]?

A. Personal use, yes.

Q. Officer, do you see sales, drug dealers behind every rock? In other words, every time you look at something, do you see a drug dealer? Or do you use a professional opinion to determine sales, looks more like possession?

A. Yeah, I just—I take the evidence in front of me and that pretty much determines *what I'm going to submit charges for*.

Q. And in this case with the meth, your professional determination is?

A. Possession of methamphetamines for sale.

(Emphasis added.) Thus, in context, Campbell's testimony did not reflect his opinion "of whether the defendant was guilty." *Fuening*, 139 Ariz. at 605, 680 P.2d at 136 (officer asked "whether the defendant was driving while intoxicated . . . is actually being asked his opinion of whether the defendant was guilty" inconsistent with "the spirit of the rules")

of evidence). Instead, the “determination” in question here was Campbell’s opinion of whether, considering the “totality of the circumstances” in the case, the evidence would be sufficient to support submission of a possession for sale charge to the grand jury for its consideration of probable cause.

¶5 Moreover, we agree with the state that Valenzuela has failed to address this court’s decisions distinguishing an officer’s testimony regarding the indicia of narcotics sales—a subject likely to be beyond the experience of jurors—from the conclusory opinion of “intoxication” addressed by our supreme court in *Fuening*. See *State v. Fornof*, 218 Ariz. 74, ¶ 21, 179 P.3d 954, 960 (App. 2008) (police officer’s “expert testimony concerning whether drugs were possessed for sale has long been admissible in this state”), quoting *State v. Carreon*, 151 Ariz. 615, 617, 729 P.2d 969, 971 (App. 1986) (“We do not believe that *Fuening* affects that long-standing rule in Arizona.”).<sup>1</sup> Based on these authorities, we conclude Campbell’s opinion testimony was permissible, particularly in light of the trial court’s correct instruction that the jury was free to reject expert testimony and draw its own conclusions.

¶6 Valenzuela has failed to establish any error, much less fundamental error, associated with the state’s presentation of Campbell’s testimony. See *State v. Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d 601, 608 (2005) (defendant “bears the burden of

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<sup>1</sup>In *Fuening*, our supreme court recognized that a proper analysis includes a determination whether under Rule 403, Ariz.R.Evid, such testimony merely embraces an issue of ultimate fact or really amounts to an improper opinion on guilt or innocence. 139 Ariz. at 605, 680 P.2d at 136. Here, even if we construe Campbell’s testimony as an opinion on the ultimate “for sale” issue, we conclude on the record before us that the testimony did not unfairly prejudice Valenzuela.

establishing both that fundamental error occurred and that the error caused him prejudice”). Accordingly, we affirm Valenzuela’s convictions and sentences.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge